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IN THE

SUPREME COURT OF THE UNITED STATES

No. 953

APRIL TERM, 1941

313 US #19
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KEARNS COAL CORPORATION,
Petitioner,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
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New York, April 10, 1941.

Appeal Printing Co., Inc., 130 Cedar St., New York

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UNITED STATES FIDELITY & GUARANTY COMPANY,
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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully alleges:

I. That on March 3, 1941, the Circuit Court of Appeals for the Second Circuit reversed a judgment which had been entered in the District Court of the United States for the Southern District of New York in favor of the plaintiff (petitioner herein) and against the defendant (respondent herein) for the sum of $18,300.50

and directed a dismissal of the complaint. The judgment below also dismissed the defendant's counterclaim and that portion of the judgment dismissing the counterclaim was affirmed by the Circuit Court of Appeals. The judgment below was obtained after a trial before District Judge Harold P. Burke and a jury. The opinion of the Circuit Court of Appeals is printed at the end of the record. Petitioner is unable to specify the page because this petition is being prepared at the same time as the record is being completed by the insertion of the opinion. A petition for rehearing was denied without opinion on April 2, 1941. The references below are to folios of the Record.

A

Summary statement of the matters involved

II. Petitioner, Kearns Coal Corporation, is a retail coal dealer. In 1933 it owned three trucks of its own and when it had more business than its own trucks could handle, Pagano, the office manager of Kearns Coal Corporation, would call up Newton Contracting Company and ask them to send up a truck and driver, specifying the date when they would be needed (ff. 131-134, 157). The wages of the driver were paid by Newton which also furnished the gasoline and paid for repairs and storage of the truck (ff. 135, 174). Kearns Corporation paid Newton $30 a day for nine hours' work of the truck and driver starting at seven o'clock in the morning and ending at five o'clock at night, with one hour for lunch (f. 135).

On December 31, 1933, Kearns Corporation was using one of the Newton Company trucks driven by a man named Williams (ff. 287, 288). A little after four

o'clock in the afternoon, Pagano, the office manager of Kearns Corporation, handed Williams a delivery ticket showing that he was to deliver a load of coal to Acker & Son at 6 West 190th Street, New York City. Pagano told Williams that this was his last delivery and to come back in the morning (ff. 151, 289). The truck was loaded by a helper employed by Kearns Corporation, who went with the truck to the place of delivery and unloaded the coal (f. 290). No instructions were given Williams by Kearns Corporation as to the route he was to take or how he was to drive, nor was he instructed by them what he was to do with the truck after the last delivery was made or where it was to be stored (ff. 152, 294).

Williams drove the truck with its load of coal to 6 West 190th Street, dumped the coal on the sidewalk, and drove away, leaving the helper to shovel the coal into the customer's premises (ff. 290, 291). He started for the garage where he had been instructed by Newton Contracting Company to store the truck (f. 319). At about 5:15 P. M., while en route to the garage, the truck ran into a sled on which a boy, William Pasley, was coasting, causing serious injuries to the boy which necessitated the subsequent amputation of his leg (ff. 293, 1156).

At the time of the accident two relevant automobile liability policies were in existence, one issued by respondent, United States Fidelity & Guaranty Company, and one by Travelers Insurance Company. The policy issued by respondent named as assured Newton Contracting Co. Inc. and/or The Hastings Pavement Company (Ex. 1—f. 976, Declarations, item 1). In this policy respondent agreed:

> "Sec. I. To pay all sums which the Assured shall became liable to pay as damages imposed upon

him by law for bodily injury * * * accidently sustained by any person or persons if caused by the ownership, maintenance or use of any automobile disclosed in the declarations for the purposes therein stated; * * *."

Sec. II (1) provides:

"The unqualified word 'Assured' includes not only the Named Assured but any other person or organization while using any such automobile, including also any other person or organization responsible for the use thereof, provided the disclosed and actual use of such automobile is 'Pleasure and Business', or 'Commercial' each as defined herein and further provided that such use is with the permission of the Named Assured, * * *."

By Sec. II(4)(a) the Company further agrees:

"To defend in his name and behalf any suit against the Assured, seeking damages on account of such bodily injury * * *, even if such suit is groundless, false or fraudulent * * *."

In Item 3 of the Declarations the business of Newton Contracting Co. Inc. is given as "paving contractor".

Item 10(b) provides:

"The term 'Commercial' when used is defined as the transportation or delivery and the loading and unloading of goods and merchandise in direct connection with the Assured's occupation as expressed in Item 3."

Section IV of the policy provides:

"This policy shall exclude any obligation of the company * * *.

(b) Under any of the above Agreements while any disclosed automobile is rented to others or used for livery purposes or for carrying passengers for a consideration."

The policy is also made subject to the following condition:

> "(d) If the Named Assured has concurrent insurance covering a loss also covered hereby, the Company shall be liable * * * only for the proportion of such loss which the sum hereby insured bears to the whole amount of valid and collectible concurrent insurance. If any other Assured has valid and collectible insurance against a loss also covered by this Policy, such other Assured shall not be insured under this Policy."

While the business of Newton was given in the policy as "paving contractor" the general agent of the insurance company who issued the policy knew at the time it was issued that the trucks were being used to carry coal (ff. 387, 388) and with the policy was issued a certificate of insurance addressed to Stephens Fuel Co. Inc., another retail coal dealer, notifying it that the policy was in force and agreeing to notify Stephens Fuel Company of any cancellation of or change in the policy (Ex. 19, f. 1102), which indicates knowledge by the insurer that the truck was to be used to carry coal for others (ff. 366, 367).

The policy issued by Travelers Insurance Company effective June 15, 1933, named Kearns Coal Corporation as assured with limits of 40,000/80,000 on liability for personal injuries. This policy (Ex. I, f. 1237) covered a specified truck by description and also by attached rider 1500 was extended to include "all hired automobiles and trailers used by the assured during the policy period for the purposes stated in the declarations, * * *."

This same rider 1500 contains the following provision:

> "It is further agreed that if there exists, at the time of a loss covered by this Policy, a policy of

> insurance under the terms of which the Named Assured is entitled to protection and coverage against such loss, then the insurance afforded by this policy shall be excess insurance over and above the amount of such other valid and collectible insurance."

On January 5, 1934, an action was brought by William Pasley through his guardian *ad litem* to recover damages for personal injuries and by Anna Pasley, his mother, to recover for loss of services and expenses, the damages claimed being $100,000 for the boy and $50,000 for his mother (ff. 982-1000). Kearns Coal Corporation, Newton Contracting Co. Inc. and George Williams were all three named as defendants, the complaint alleging that defendant Kearns Coal Corporation had been using the truck owned by defendant Newton Contracting Company "as bailee for hire or otherwise" and that Williams at the time of the accident was operating the truck "with the knowledge, approval and acquiescence of all of the defendants and in the scope of his employment for the defendants" (ff. 989, 990).

The Travelers took the position that its policy was an excess policy under the above quoted provision of rider 1500 and that the owner's policy issued by respondent was primarily liable, and suggested to Kearns Corporation and also to respondent, United States Fidelity & Guaranty Company, that the latter should appear and defend the Pasley action on behalf of Kearns Corporation. This, after some demur, the respondent did and on February 14, 1934, it appeared in the Pasley action on behalf of the defendant Kearns Corporation, having previously appeared for defendants Newton and Williams (f. 681). No reservation of rights was made by respondent and the testimony shows and the jury specifically found that at the time it assumed the defense of

said action on behalf of Kearns Corporation it had knowledge of all the facts and circumstances relative to the custody, control and management of the truck at the time of the accident and also knowledge of the terms and conditions of the Travelers policy relative to its coverage on hired automobiles (ff. 1312, 1313).

Respondent employed its own attorneys, Jenkins, Dimmick & Finnegan to appear on behalf of all three defendants (ff. 398, 410). It continued in full control of the defense of the Pasley action on behalf of Kearns Corporation until October 24, 1934, a period of more than eight months (ff. 37, 38). In the meantime on March 14, 1934 Mr. John J. Kearns, then President of Kearns Coal Corporation, was examined before trial with respect to the control and operation of the truck at the time of the accident (ff. 449, 580, 583). Mr. O'Rourke, a young attorney in the office of Jenkins, Dimmick & Finnegan, acted as counsel for Kearns Coal Corporation on the examination as well as for the other two defendants (ff. 447, 458). Although under the New York decisions it was extremely doubtful whether Kearns Coal Corporation had any supervision or control of the truck at the time of the Pasley accident, Mr. Kearns was not advised of this, nor in fact did counsel have any discussion of the law or facts with him prior to the examination (ff. 468, 476, 480). Moreover, despite the fact that the witness was totally without advice on the law, plaintiff's attorney was permitted upon the examination to ask him, without objection, whether the truck was under the supervision and control of Kearns Coal Corporation at the time of the accident, to which questions he gave an affirmative reply (ff. 461, 496). He gave this very damaging testimony under the erroneous impression, which counsel had failed to correct, that the giving of orders as

to where the truck was to deliver coal legally constituted supervision and control (ff. 584-595).

Thereafter on October 24, 1934, more than eight months after it had assumed the defense of the Pasley action, the defendant United States Fidelity & Guaranty Company disclaimed liability as to Kearns Coal Corporation on the ground that through the examination of Mr. Kearns (held on March 14th) it had come to its attention that the automobile involved in the accident was rented to Kearns Coal Corporation at the time of the accident. The papers in the action were returned to Kearns Coal Corporation with a suggestion that the matter be given its preferred attention as a motion for preference had been granted and the case might be reached for trial within the next week or ten days (ff. 1036-1041). The Kearns Company refused to accept the disclaimer and through its counsel demanded that the United States Fidelity & Guaranty Company continue with the defense of the action, which the latter refused to do (ff. 1043-1047).

The Travelers Insurance Company thereupon assumed the defense of the Pasley action on behalf of Kearns Coal Corporation with the specific stipulation that by so doing it did not waive any claim that it or Kearns Coal Corporation had against Newton Contracting Company or United States Fidelity & Guaranty Company. The Travelers consistently maintained its position that its policy was an excess policy and that the Kearns Coal Corporation was covered first by the United States Fidelity & Guaranty Company policy (ff. 1073-1076, 1081).

The Pasley action was tried and a verdict of $100,000 was rendered against all three defendants. This verdict was set aside by the trial court as excessive (ff. 1109-1111). On appeal from the order setting aside the ver-

dict the order was affirmed (ff. 1255-1259). Just before the argument of the appeal the United States Fidelity & Guaranty Company paid $15,000 to the attorneys for the Pasley plaintiffs and obtained a discontinuance of the Pasley action as to Newton Contracting Company and George Williams and releases running to Newton Contracting Company, George Williams and United States Fidelity & Guaranty Company (ff. 830, 833, 1297). A second trial was then had which resulted in a verdict of $36,600 against Kearns Coal Corporation, the sole remaining defendant (ff. 1015, 1016). Judgment was entered on the verdict and execution issued and Pagano, as an officer of Kearns Coal Corporation, was examined in supplementary proceedings (ff. 176, 1070). Kearns Coal Corporation demanded of United States Fidelity & Guaranty Company that it either pay the judgment, or bond the judgment and take an appeal, but it refused to do either (Exs. 11, 12, 13, f. 1048, et seq.). Thereafter the Travelers advanced $15,000 to Kearns Coal Corporation under a loan agreement specifically stating that the advance was without prejudice to its position that the Travelers policy did not cover the loss except as an excess policy (ff. 1084, 1096). Kearns Coal Corporation then paid $15,000 to the Pasleys in settlement and obtained a satisfaction of the judgment (ff. 182, 184, 1063, 1069).

Thereafter this action was commenced by Kearns Coal Corporation to recover the sum of $15,000 paid in settlement of the Pasley action, plus the reasonable charges of its own attorneys in connection with the defense of that action, which on the trial were stipulated to be $500 (f. 731). The defendant in addition to the denials and affirmative defenses in its answer set up a counterclaim for the amount of $15,000 which it had paid for the release of Newton Contracting Company

and George Williams, claiming that it was entitled to recover this amount as subrogee of Newton Contracting Company.

The trial court submitted to the jury written interrogatories together with appropriate forms for a general verdict pursuant to Article 49 (b) of the Federal Rules of Civil Procedure (ff. 942, 964, 1312). The jury answered the written interrogatories and found specifically (1) that the truck at the time of the accident was not under the custody, control and management of the Kearns Coal Corporation; (2) that the Fidelity & Guaranty Company at the time it assumed the defense of the Pasley actions for Kearns Coal Corporation had knowledge of all the facts and circumstances relative to the custody, control and management of the truck at the time of the accident; (3) that the Fidelity & Guaranty Company at the time it assumed the defense of the Pasley actions for Kearns Coal Corporation had knowledge of the terms and conditions of the Travelers policy relative to its coverage on hired automobiles; and (4) that Kearns Coal Corporation was prejudiced or its position was adversely affected by the fact that the Fidelity & Guaranty Company undertook the defense on its behalf of the Pasley actions in February, 1934, and continued the defense until October, 1934 (ff. 1312, 1313).

It also found that plaintiff was entitled to recover on its claim against defendant and that defendant was not entitled to recover on its counterclaim (f. 1313). Upon the answers to the special questions and the general verdict the court directed judgment in favor of plaintiff dismissing the counterclaim and for the sum of $15,500 with interest (ff. 1310, 1316).

The Circuit Court of Appeals reversed the judgment and directed a dismissal of the complaint on the grounds

that (1) the plaintiff was in no event insured under the policy issued by the defendant, (2) the defendant, as a matter of law, was not estopped to deny that its policy covered the plaintiff, and (3) there was no evidence to support the jury's finding of actual prejudice, and the issue of prejudice should not have been submitted to the jury.

B

III. The following are the questions presented for review by this Court:

1. Was the decision of the Circuit Court of Appeals that as a matter of law respondent was not estopped to deny coverage to petitioner under its automobile liability policy contrary to the law of New York as laid down by the New York decisions?

2. Was there an issue of fact for the jury whether petitioner was prejudiced or its position adversely affected by the respondent's assumption and conduct of the defense of the Pasley actions on behalf of petitioner?

3. Was petitioner an "additional assured" under the respondent's policy?

C

IV. Reasons relied on for the allowance of the writ.

1. That the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. This decision stands alone in the State of New York in holding that where an insurance company issuing a liability policy assumes the defense of an action against its insured without reservation and with full knowledge of all the mate-

rial facts and continues in sole charge of such defense for a period of more than eight months, there is not even an issue of fact as to whether prejudice to the insured has resulted which will support an estoppel.

Petitioner further alleges (2) that in setting aside the verdict of the jury in favor of the plaintiff and in particular the specific finding of the jury that the respondent was actually prejudiced and its position adversely affected by the assumption and conduct of the defense of the Pasley actions by respondent on behalf of petitioner, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein, and that the order of the Circuit Court of Appeals, in so far as it reverses the judgment of the District Court in favor of petitioner and directs a dismissal of the complaint, may be reversed by this Honorable Court and the judgment of the District Court herein reinstated, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

New York, April 10, 1941.

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
Counsel for Petitioner.